Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

89-587

IN THE SUPREME COURT OF
THE UNITED STATES OF AMERIC
August Term, 1989

U. S. Sup. Ct _____

KENNY ROPER,

Petitioner,

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEAL
OF THE UNITED STATES OF AMERICA

COUNSEL FOR PETITIONER:

For: Kenny Roper

J. Paul Lowery
Attorney at Law
28 So. Hull St.
P. O. Box 348
Montgomery, AL 36101-0348
205-262-6629

59 pp

Questions Presented

Petitioner Kenny Roper petitions the Supreme Court of the United States of America for Writ of Certiorari to the Eleventh Circuit Court of Appeal of the United States for the purpose of reviewing the following issues:

1. That no criminal conspiracy was proved by the United States in the prosecution and conviction of this petitioner of an alleged drug law violation and the failure of the Eleventh Circuit Court of Appeals to reverse is in direct conflict with other decisions of that court, of the circuit courts of appeal and of the United States Supreme Court.

2. Where there was a finding by the trial court of actual prejudice to this petitioner in connection with the presentation of evidence by the government of previous illegal drug transactions and activities then the trial court erroneously failed to grant a motion for mistrial made by petitioner and the decision by the Eleventh Circuit affirming that conviction is in direct conflict with opinions of the Eleventh Circuit and other circuits of the United States.

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Petitioner prays that a writ of certiorari issue to review Opinion of the United States Court of Appeal for the Eleventh Circuit entered on June 6, 1989; Petition for Stay of Mandate denied on July 12, 1989, by Eleventh Circuit Court of Appeal; motion filed in this court on August 3, 1989.

OPINIONS BELOW

The Order of the United States District Court, Middle District of Alabama and the opinion of the Eleventh Circuit Court of Appeals is set forth in the Appendix, pp.1 (District Court) and pp. (Eleventh Circuit).

JURISDICTION

The jurisdiction of the United States District Court for the Middle District of Alabama was pursuant to an alleged violation of 21 USCS 841, 846. This Statute pertains to conspiracy on the part of Petitioners to possess with intent to distribute and distribution of a scheduled one controlled substance, marijuana.

Questions Presented

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2. Where there was a finding by the trial court of actual prejudice to this petitioner in connection with the presentation of evidence by the government of previous illegal drug transactions and activities then the trial court erroneously failed to grant a motion for mistrial made by petitioner and the decision by the Eleventh Circuit affirming that conviction is in direct conflict with opinions of the Eleventh Circuit and other circuits of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS

21 USCS 841 (A) (1), except as authorized by this subchapter, it shall be unlawful for any person knwoingly or intentionally— (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ....

21 USCS 846, any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

United States Constitution Amendment VI, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

United States Constitution Amendment V, no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner was indicted and convicted of a conspiracy to possess and distribute one thousand pounds of marijuana in violation of 21 USC 841 and 846. This conviction occurred in the United States District Court for the Middle District of Alabama. It was appealed to the Eleventh Circuit Court of Appeals of the United States which conviction was affirmed by a written opinion and judgment from that court. (See Appendix)

During the trial, proof was offered by the government to the effect that one of these Petitioner (Jim Childress) and another Petitioner (Kenny Roper) had previous dealings in obtaining and transporting illegal contraband in the state of Mexico and nation of Mexico. This relationship went back several years. Before the case was sent to the jury the trial court excluded such evidence and found the same to be prejudi-

cial.

Proof of the conspiracy occurred in the following manner: a convicted drug dealer named Becky Garcia acting as an undercover informant contacted Childress regarding further dealings in contraband marijuana. A meeting was scheduled between Childress and Ms. Garcia's contacts. It was to be held in a motel in Montgomery, Alabama. Although Ms. Garcia (the undercover informant) was not present when the meeting was held on July 30, 1987, other persons were present who represented themselves as dealers in large quantities of marijuana offered for sale. These drug dealers were undercover DEA agents conducting a "reverse sting."

At the meeting Childress and Roper inspected the contraband loaded in a trailer outside the motel, but were unable to provide sufficient funds to the "drug dealers" so that a trip was made to Mobile, Alabama, that same evening to acquire purchasers for the "drug dealers." Some confusion arose and the DEA

agents testified that the case was "aborted".

There was no further contact with Kenny Roper by any of the others involved in this case.

Contact was made by informant Becky Garcia with Petitioner Childress on approximately August 5, 1987. Negotiations were made in September and October by telephone between Garcia and Childress and ultimately all were arrested (except Roper) on November 17, 1987, at the scene of the alleged transaction at an airport in a remote area of Montgomery County, Alabama.

Petitioners William Price, William Belcher and William Green appeared for the first time on the night of the arrest, i. e., November 17, 1987. Petitioner Roper was not present nor was any contact made by telephone or personally by him during this transaction.

REASONS FOR GRANTING

ISSUE ONE

NO CRIMINAL CONSPIRACY

The Government offered proof that an agreement was made on July 30, 1987, between Childress and Roper, (Petitioner) to purchase 1,000 pounds of marijuana at Montgomery, Alabama. The Petitioner appeared at a local motel at Montgomery, Alabama, and after examination of the contraband was unable to pay or finance the transaction. A trip was made to Mobile, Alabama, by Petitioner with certain undercover law enforcement agents to attempt to find a purchaser. By the testimony of the Government agents the trip or mission was "aborted".

On or about August 5, 1987, contact was made by undercover informant Garcia to petitioner Childress regarding purchase of another 1,000 pounds of marijuana. Negotiations by telephone occurred between Childress and Garcia during September and October, 1987, and ultimately on

November 17, 1987, all the principals including Childress were arrested at the site where the transaction was to have occurred.

There was no participation personally or by telephone or otherwise by Petitioner Roper as he was in a hospital and incapable of participating.

Roper had no knowledge of the August 5, 1987, transaction.

It is from the above statement of facts, which statement is the heart of the Government's case, that the Petitioner maintains that the Government, in fact, proved two separate and distinct conspiracies. Petitioner Roper, as a matter of law, cannot be convicted for the reason that the first alleged conspiracy was "aborted" and the second alleged conspiracy had no evidence of his participation or involvement.

The above circumstances resulted in a conviction of Roper and the others. To hold that there was one continuing conspiracy (as opposed

to two separate conspiracies) would be a violation of long established case law. U. S. v. Jones, 765 F. 2d, 996, 1985 (11 CA 1985); U. S. v. Alvarez, 548 F. 2d 542, (CA 5, 1977); * U. S. v. Cepeda, 768 F. 2d, 1515, (CA 2, 1985); * U. S. v. Cook, 783 F. 2d, 1207, (CA 5, 1986); * U. S. v. Fernandez, 797 F. 2d, 943 (11 CA 1986); U. S. v. Gomez, 776 F. 2d, 542 (5 CA, 1985).

The government failed in its proof:

> ..."That from on or about the 30th of July, 1987, and continuously (emphasis supplied) thereafter until on or about the 17th of November, 1987, at Montgomery...Defendants did knowingly and willfully combine, conspire, confederate and agree together (emphasis supplied) ..."

beyond a reasonable doubt.

ISSUE II

MISTRIAL

During the trial, evidence of previous alleged illegal drug transactions was admitted by the trial court; when the Government rested

the Trial Court then directed the jury to exclude consideration of any evidence of alleged drug transactions or activity prior to July 30, 1987, for the reason that the same was prejudicial. The trial court found that there was actual prejudice to the Defendants of the previous illegal activities of Childress and Roper and should not be considered by the jury. A motion for mistrial was made by all Defendants and denied. The failure of the trial court and the lower court of appeals to reverse on this point is in conflict with established case law of other circuits. Barton v. The U. S. , 263 F. 2d, 94 (5 CA, 1959); U. S. v. Dinitz , 424 U. S. 600, (1976).

RULINGS BELOW

The Eleventh Circuit Court of Appeals affirmed the conviction of Petioner Roper on June 6, 1989, and rejected these points of arguement on appeal:

A. That there were two separate and distinct conspiracies proved by holding that

> ..."Once conspiracy has been established involving defendant, it is presumed to continue unless and until defendant proves, by showing affirmative acts, that conspiracy was terminated or that he withdrew from it; burden is on defendant to prove he has withdrawn from conspiracy. ..."

B. That ..."In procesution for conspiracy to possess withintent to distribute approximately 1,000 pounds of marijuana, trial court properly refused to instruct jury on lesser included offense of conspiracy to possess marijuana,

given large quantity of marijuana involved in case. Comprehensive Drug Abuse Prevention and Control ACt of 1970, 401 (a)(1), 406, 21 USCA 841(a)(1), 846. ..."

There was a clear abuse of discretion by trial court in this matter.

CONCLUSION

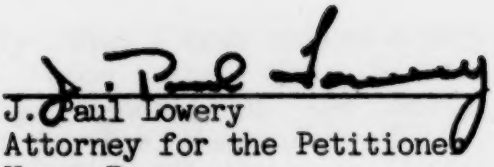
Petitioner earnestly insists that the United States Supreme Court upon review of this petition will grant the writ of certiorari and after consideration of the briefs and arguments will enter an order reversing the convictions of this Petitioner for these grounds:

A. That no criminal conspiracy was proven as a matter of law and therefore the opinion of the Eleventh Circuit Court of Appeals was in conflict with established case law;

B. That a mistrial should have been granted the Petitioners when the trial court found there was actual prejudice to them of certain evidence pertaining to prior illegal drug transactions in the same was in direct conflict the rulings and opinions of the Eleventh Circuit and other circuits.

Wherefore, Petitioner asks this court upon consideration of this petition grant the writ of certiorari as to all Petitioners for the grounds

stated.



J. Paul Lowery
Attorney for the Petitioner
Kenny Roper

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing upon the Hon. Richard Thornburgh, Attorney General of the United States Department of Justice, Washington, D. C., Hon. James H. Wilson, District Attorney, United States District Court for the Middle District of Alabama, Federal Courthouse, Montgomery, Alabama, an upon the Hon. Kenneth W. Starr, Office of the Solicitor General, U. S. Department of Justice 10th and Pennsylvania Ave N.W., Washington, DC 20530 by placing a copy of the same in the United States Mail, postage prepaid, addressed as above, their last known addresses, on this the 15 day of August, 1989.

J. Paul Lowery

In the United States District Court

Kenny Roper, et al.,
v.
United States.

112. Sentence.
JUDGMENT and COMMITMENT ORDER. Defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 97 MONTHS. Defendant shall be placed on supervised release for a term of THREE (3) YEARS upon release from imprisonment subject to the standard conditions of supervision that have been adopted by this Court and subject to the following additional conditions: that defendant participate in a program approved by the probation office for urinalysis testing and, if indicated, treatment for drug addiction, alcohol addiction or drug dependency; that defendant be prohibited from possessing a firearm or other dangerous weapon; that defendant shall pay to the United States a special assessment fee of $50.00 to be paid on or before 5-16-88. Defendant is ORDERED to stand committed for service of his sentence at the institution designated by the Bureau of P Prisons before 2 p.m. on 5-31-88.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	CR. NO. 87-263-N
	)	
KENNY ROPER	)	

We, the Jury, find the Defendant, Kenny Roper, guilty as charged in the Indictment.

This the 25th day of February, 1988.

Carla Winborne
Foreperson

pp2

UNITED STATES of America

Plaintiff-Appellee.

v.

Kenny ROPER, William Price,
William Belcher, Jim Childress,
William Green,

Defendants-Appellants.

No. 88-7298

United States Court of Appeals,
Eleventh Circuit.

June 6, 1989.

Defendants were convicted in the United States District Court for the Middle District of Alabama, No. CR-87-263-N, Robert E. Varner, Jr., of conspiracy to possess with intent to distribute approximately 1,000 pounds of marijuana. One defendant was also convicted of unlawful use of communication facility to commit a felony. Defendants appealed. The Court of Appeals, Hatchett, Circuit Judge, held that: (1) evidence was insufficient to sustain conspiracy

convictions; (2) trial court properly permitted cooperating witness to testify concerning her prior marijuana transactions with two defendants; (3) trial court properly denied certain defendants' motions for severance; and (4) trial court properly refused to instruct jury on lesser included offense of conspiracy to possess marijuana.

Affirmed.

1. Criminal Law - 1144.13 (3.5), 1159.2(7)

In determining challenges to sufficiency of evidence in criminal case, Court of Appeals must determine whether evidence, when viewed in light most favorable to Government, and accepting reasonable inferences and credibility choices by fact finder, would enable trier of fact to find defendant guilty beyond a reasonable doubt.

2. Conspiracy - 23

To support conviction of conspiracy, Government must prove that two or more persons agreed to commit a crime, that defendant knew of

agreement, and that he or she voluntarily became a part of conspiracy.

3. Conspiracy - 47(1.2)

Participation in conspiracy may be proved by direct or circumstantial evidence.

4. Conspiracy - 44 1/2

Once conspiracy has been established involving defendant, it is presumed to continue unless and until defendant proves, by showing affirmative acts, that conspiracy was terminated or that he withdrew from it; burden is on defendant to prove he has withdrawn from conspiracy.

5. Conspiracy - 41

Once having joined a conspiracy and not having withdrawn, conspirator cannot insulate himself from actions of co-conspirator.

6. Conspiracy- 40.1, 40.3

Defendant may be found guilty of conspiracy even if he did not join until after its inception, and even if he played only minor role in total scheme.

7. Conspiracy - 47(12)

Evidence was sufficient to support defendants' convictions of conspiracy to possess with intent to distribute approximately 1,000 pounds of marijuana; on one day during existence of conspiracy, first defendant inspected load of marijuana and brought third unidentified party to truck stop to evaluate quality of marijuana, and three other defendants were aware that they were to unload 1,000 pound cargo of marijuana from airplane because undercover agent notified them that they would be unloading marijuana when he briefed them at meeting among conspirators at motel. Comprehensive Drug Abuse Prevention and Control Act of 1970, Sec. 401(a)(1), 406, 21 U.S.C.A. Sec. 841(a)(1), 846.

8. Criminal Law - 369.1, 1169.11

To determine whether introduction of extrinsic offense evidence constitutes reversible error under Federal Rules of Evidence 403 and 404(b), Court of Appeals must consider whether

extrinsic offense evidence is relevant to issue other than defendant's character, and whether evidence possess probative values that is not substantially outweighed by its undue prejudice. Fed. Rules Evid. 403, 404(b), 28 U.S.C.A.

9. Criminal Law - 369.2(1)

Although Government normally may not introduce evidene of defendant's predisposition to engage in criminal activity, it may do so once defendant submits evidence which raises .lil possibility that he was entrapped; introduction of extrinsic offense evidence is reliable method of proving criminal predisposition needed to rebut allegation of entrapment. Fed. Rules Evid. Rules 403, 404(b), 28 U.S.C.A.

10. Criminal Law - 369.2(7)

In prosecution for conspiracy to possess with intent to distribute approximately 1,000 pounds of marijuana, trial court properly admitted cooperating witness' testimony concerning her prior dealings with defendants in sale of

large quantities of marijuana, particularly in light of entrapment defense raised by one defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, Sec. 401(a)(1), 406, 21 U.S.C.A. Sec 841(a)(1), 846.

11. Criminal Law - 867, 1155

Decision whether to grant a mistrial is within sound discretion of district court and will not be reversed absent showing that district court abused its discretion. .lil

12. Criminal Law - 622

Defendants jointly indicted should be so tried, except where joinder would cause Defendant undue prejudice; in determining whether to grant or deny motion for severance, trial judge is empowered to exercise sound discretion in balancing possible prejudice to defendant against governmental concern for judicial economy. Fed. Rules Cr. Proc. Rule 14, 18 U.S.C.A.

13. Criminal Law - 622.2(3)

Inherent in every joint trial is some degree of prejudice and bias, but only in event such prejudice appears to be compelling does severance become warranted. Fed. Rules Cr. Proc. Rule 14, 18 U.S.C.A.

14. Criminal Law - 795 (2.25)

In prosecution for conspiracy to possess with intent to distribute approximately 1,000 pounds of marijuana, trial court properly refused to instruct jury on lesser included .lil offense of conspiracy to possess marijuana, given large quantity of marijuan involved in case. Comprehensive Drug Abuse Prevention and Control Act of 1970, 401(a)(1), 406, 21 U.S.C.A. 841(a)(1), 846.

15. Criminal Law - 822(1)

Appellate court must examine entire jury charge and determine whether, taken as a whole issues and law presented to jury were adequate.

16. Criminal Law - 863(2)

In prosecution for conspiracy to possess

with intent to distribute approximately 1,000 pounds of marijuana, trial court's supplemental instruction in response to jury question whether defendant who was not continuously involved could be convicted of conspiracy, combined with previous written instructions, adequately presented issues and law to jury. Comprehensive Drug Abuse Prevention and Control Act of 1970, 401(a)(1), 406, 21 U.S.C.A. 841 (a)(1), 846.

17. Criminal Law - 641.13(2)

Defendant charged with conspiracy to possess with intent to distribute approximately 1,000 pounds of marijuana was not denied effective assistance of counsel based on contention that facilities at city jail where he was incarcerated required that he and his counsel make public disclosures in loud voices by communication over telephone and through glass window and steel door and that other prisoners and law enforcement officers heard every detail of his defense; defendant failed to make showing that

tainted evidence existed in his case, his defense strategy was communication to prosecution, or that Government purposefully intruded on his case. U.S.C.A. Amend. 6.

18. Criminal Law - 338(1), 1153(1)

Determination of admissibility of evidence rest largely within discretion of district court and will not be disturbed on appeal absent clear showing of abuse of discretion.

19. Criminal Law - 662.7

In prosecution for conspiracy to possess with intent to distrubte in which defendant raised defense of duress, trial court's limitations of defendant's cross-examination of undercover agent as to his training in use of firearms did not violate defendant's confrontation rights, as questions concerning whether agent had ever had to use weapon in making an arrest were irrelevant to defense of duress. U.S.C.A. Amend. 6.

Appeal from the United States District Court for the Middle District of Alabama.

Before TJOFLAT and HATCHETT, Circuit Judges, and ESCHBACH, Senior Circuit Judged.

HATCHETT, Circuit Judge.

In this reverse-sting marijuana possession with intent to distribute case, we affirm the convictions and judgments as to all appellants.

FACTS

Between 1980 and 1985, Rebecca Lynn "Becky" Garcia, Jim Childress, and Kenny Roper exercised six to ten marijuana transactions, each involving between one hundred and five hundred pounds of marijuana.

The transactions continued in July, 1986, after Garcia pleaded guilty to four counts of trafficking cocaine, one count of trafficking heroin, one count of conspiracy to traffic heroin, one count of trafficking marijuana, one count of racketeering, and one count of conspiracy to assist in an escape. As a condition of

her plea bargains with the United States and the state of New Mexico, Garcia supplied the names of people all over the United States to whom she had provided drugs, including Childress and Roper.

Special Agent Dennis Borst of the Drug Enforcement Administration, United States Department of Justice (DEA), Las Cruces, New Mexico, instructed Garcia to re-establish contact with Childress and Roper. Garcia contacted Childress and attempted to persuade him to purchase drugs from her in New Mexico. Childress indicated that he was interested in the transaction, but medical problems prevented him from traveling such a long distance. Garcia offered to deliver the drugs to Childress in Alabama. Childress agreed, and DEA agents in Mobile, Alabama, were notified.

On July 29, 1987, Garcia and Borst met with Special Agent Douglas Lamplugh, DEA Mobile, Alabama, in Mobile. Garcia and Lamplugh planned a

1,000-pound marijuana reverse sting operation. (In a reverse sting, the government organizes the sale of contraband.) Garcia told Childress that she would be in Montgomery, Alabama, on July 30, 1987, with her partner to complete the marijuana sale.

On July 30, 1987, Garcia traveled to Montgomery, Alabama to meet Childress and Roper. Garcia, Agent John Pigott, of the Mobile County Sheriff's Office, Mobile, Alabama, Drug Enforcement State and Local Task Force, and Special Agent Gary Oetjen, DEA Mobile, Alabama, obtained room 108 at the Budgetel Motel on the East Bypass in Montgomery, Alabama. Pigott played the role of a large-scale supplier, smuggler, and importer of marijuana from New Orleans, Louisiana, and Oetjen played the role of Pigott's driver, operating a U-Haul truck containing seventeen bales of marijuana. Oetjen and Pigott set up audio and video surveillance in room 108 prior to the meeting.

After reaching Montgomery, Childress met with Garcia prior to meeting with Oetjen and Pigott. Garcia then introduced Childress to Oetjen and Pigott. After some discussion of details, Oetjen and Childress left the room, walked to the U-Haul truck in the Budgetel parking lot, and viewed the marijuana. Upon returning to the room, Childress indicated that he could not purchase a thousand pounds of marijuana, and indicated that he wanted to split the load or take a portion of the load on credit. The governmment agents refused these arrangements, and Childress left without any transaction being completed.

On July 31, 1987, Oetjen, Pigott, Garcia, Childress and Roper met again at the Budgetel Motel. Childress stated that a man in Mobile, Alabama, wanted to purchase 300 pounds of the marijuana; however, he wanted Roper to inspect it. Oetjen and Roper walked to the adjoining LaQuinta Hotel parking lot, entered the truck,

and inspected the marijuana. The parties agreed to reconvence in Mobile, Alabama, for further negotiations. Pigott agreed to have the marijuana in Mobile, Alabama, by 11 p.m.

At 11 p.m., Garcia and Pigott met Childress and Roper at the Waffle House in Mobile, Alabama. Childress mentioned that an unnamed person from Mobile, Alabama, would finance his purchase of the entire 1,000 pound marijuana load for $240,000. By arrangement, Pigott and Garcia met Roper and an unnamed white male at the Grand Bay Truck Stop on I-10 later that evening. Childess was not with them. Because satisfactory arrangements could not be made on how to conduct the exchange, Pigott and Garcia terminated the discussions.

During the next few months, Childress and Garcia continued to discuss marijuana purchases by telephone. On October 29, 1987, Garcia made arrangements for Pigott to meet Childress in Montgomery, Alabama. Prior to the meeting,

Lamplugh and Pigott set up video and audio recording devices in the Budgetel Motel room where the meeting took place. The discussion between Pigott and Childress focused on how to finance the purchase of the marijuana. Because Childress did not have sufficient cash, Pigott agreed to accept a promissory note secured by a real estate mortgage as security for later payment of the purchase price of the marijuana. Childress guaranteed to pay the balance from funds generated by selling the marijuana.

On November 17, 1987, Pigott again met Childress at the Budgetel Motel in Montgomery, Alabama, to finalize the details of the marijuana transaction. Law enforcement officials recorded the meeting with video and audio equipment. As arranged in earlier telephone conversations. Childress produced $25,000 in $100 bills and a promissory note secured by a warranty deed to real property. Childress then left the room and returned a few minutes later

with his off-loaders, William Green, William Belcher and William Price. Pigott briefed Green, Belcher and Price on the procedure to be followed in off-loading the marijuana from the airplane, which was to arrive shortly at a nearby private landing strip.

At approximately 3:30 p.m., Lamplugh telephoned Pigott and advised him that the plane loaded with marijuana was about to land, which signaled Pigott that law enforcement officers were in place at the landing strip. Pigott rode to the landing with Childress, in Childress's truck, followed by Price and Belcher, each driving a vehicle. Green rode with Belcher. Upon arrival at the airstrip, Lamplugh informed Pigott, Childress, Price, Belcher and Green that the airplane had landed and was in the hangar. As the convoy approached the hangar, law enforcement officers converged on the vehicles from a side-door to the hangar, arresting Childress, Green, Belcher and Price. Roper later

surrendered to federal authorities.

PROCEDURAL HISTORY

The grand jury charged Childress, Roper, Green, Belcher and Price with conspiracy to possess with intent to distribute approximately 1,000 pounds of marijuana, in violation of 21 USC Sec. 841 (a)(1) and 846 (Count 1). The grand jury also charged Childress with unlawful use of a communication facility to commit a felony, in violation of 21 USC Sec. 843 (b) (Counts II through VII). The jury found the appellants guilty as charged. The district court sentenced each appellant to a term of incarceration.

CONTENTIONS

All appellants contend that the government produced insufficient evidence to support their convictions for conspiracy, and that the district court erred in denying their motions for acquittal, in denying their motions for mistrial, refusing to give a requested jury charge

and in giving an improper supplemental jury instruction.

Roper, Price and Belcher contend that the district court erred in denying their motions for severance. Belcher also contends that he has been denied effective assistance of counsel, that certain evidence was admitted without proper predicate, and that he was denied the right to offer a duress defense.

ISSUES

The issues on appeal are sufficiency of the evidence to support the jury's verdict for conspiracy to possess marijuana with intent to distribute and the alleged trial errors previously mentioned. 1

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1. Appellants contend that the Sentencing Reform Act of 1984, 28 USC Sec. 991-998, which established the sentencing guidelines is unconstitutional. The appellants' attack on the consitutionality of the sentencing guidelines is moot. See Mistretta v. United States , — U. S. —, 109 S. Ct. 647, 102 L.Ed.2d 714 (1989) (upholding the constitutionality of the sentencing guidelines).

DISCUSSION

Sufficiency of the Evidence

Childress argues that the conspiracy must be divided into two segments. The first segment encompasses the period to and including July 31, 1987, the date of the terminated plan. The second segment would begin August 5, 1987, and end November 16, 1987, one day prior to the arrest of all appellants. Childress asserts that during the first segment of the conspiracy, he and Roper had no money; consequently no conspiracy existed because no agreement was ever reached.

Childress also argues that during the second segment of the conspiracy, from July 31 through the arrest he dealt exclusively with Garcia and Pigott; Roper did not participate. Additionally, Childress asserts that Garcia enticed him to purchase the 1,000 pounds of marijuana; therefore any conspiracy that developed was due to coercion.

Roper contends that he was not a member of the conspiracy division theory and argues although he participated in activities of the first segment, those activities were not a part of a conspiracy should be reversed, because no evidence exists to connect him to the second conspiracy.

Price, Belcher and Green argue that no evidence exist to prove that they agreed to join a conspiracy, and they only knew they would be unloading an airplane containing a cargo that would weigh approximately 1,000 pounds.

[1,2] In determining challenges to the sufficiency of evidence in a criminal case, we must determine whether the evidence, when viewed in the light most favorable to the government, and accepting reasonable inferences and credibility choices by the fact-finder, would enable the trier of fact to find the defendant guilty beyond a reasonable doubt. United States v Monroe , 866 F. 2d 1357, 1365 (11th Cir. 1989).

To support a conviction for a conspiracy, the government must prove that two or more persons agreed to commit a crime, that the defendant knew of the agreement, and that he or she voluntarily became a part of the conspiracy. United States v. Monroe , at 1365.

[3,4] Participation in a conspiracy may be proved by direct or circumstantial evidence. United States v. Gonzalez , 810 F.2d 1538, 1542 (11th Cir. 1987). Once a conspiracy has been established involving a defendant, it is presumed to continue unless and until the defendant proves, by showing affirmative acts, that the conspiracy was terminated or that he withdrew from it. Hyde v. United States , 225 U. S. 347, 369-70, 32 S.Ct. 793, 8703, 56 L.Ed. 1114 (1912). The burden is on the defendant to prove he has withdrawn from a conspiracy. United States v. Wentland , 582 F.2d 1022, 1025-26 (5th Cir. 1978), cert. denied, 439 U.S. 1133, 99 S.Ct. 1056, 59 L.Ed.2d 96 (1979).

[5,6] Once having joined a conpiracy and not having withdrawn, the conspirator cannot insulate himself from the actions of his co-conspirator. United States v. Bobo , 586 F.2d 355, 370 n. 20 (5th Cir. 1978), cert. denied., 440 U.S. 976, 99 S.Ct. 1546, 59 L.Ed.2d 795 (1979). A defendant may be found guilty of conspiracy even if he did not join it until after its inception, and even if he played only a minor role in the total scheme. United States v. Alvarez , 625 F.2d 1196, 1198 (5th Cir.1980) (in banc), cert. denied, 451 U.S. 938, 101 S. Ct. 2017, 68 L.Ed.2d 324 (1981). See United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), cert denied, 465 U.S. 1108, 104 S.Ct 1614, 80 L.Ed.2d 143 (1984) (where the court inferred that defendants understood their purpose was to consummate an illegal narcotics deal where they arrived at a site and began unloading bales of marijuana from the trunk of one vehicle into the trunk of another.)

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[7] Evidence before the jury showed that on July 31, 1987, Ropper inspected the marijuana and brought a person to the truck stop to evaluate the quality of the marijuana. Evidence also showed that Green, Price and Belcher were aware that they were to unload a 1,000-pound cargo of marijuana because Agent Pigott notified them that they would be unloading marijuana when he briefed them at the Budgetel Motel.

Reviewing the record and the evidence in light of applicable standards, we hold that sufficient evidence exists to convict all appellants of conspiracy to possess with intent to distribute marijuana.

Motion for Acquittal

Because we hold that sufficient evidence exists to support the jury's verdict of guilty on the appellants' conspiracy to possess with intent to distribute charge, the appellants' contention that the district court erred in refusing to grant judgments of acquittal in light

of the insufficiency of the evidence against them is meritless. See United States v. Rackley, 742 F.2d 1266, 1271 (11th Cir. 1984).

Denial of Mistrial

Childress and Roper contend that they were unfairly prejudiced because of Garcia's testimony concerning her dealings with them in 1980; thus, the district court should have granted their motion for mistrial. The government contends that the evidence of drug deals between Childress, Roper, and Garcia were relevant, probative, and not unfairly prejudicial. The government argues that the testimony was properly admitted under Fed.R. Evid. 404(b), and that the probative value of this evidence was enhanced by Childress's defense of entrapment.

[8-10] To determine whether the introduction of extrinsic offense evidence contitutes reversible error under Fed.R.Evid. 403 and 404(b), we must consider (1) whether the extrinsic offense evidence is relevant to an issue

other than the defendant's character, and (2) whether the evidence possesses probative value that is not substantially outweighted by its undue prejudice and must meet the other requirements of Fed.R.Evid. 403. United States v. Walther 867 F.2d 1334, 1343 (11th Cir 1989) (citing United States v. Beechum , 582 F.2d 898 (5th Cir. 1978) (in banc), cert. denied, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979)). Although the government normally may not introduce evidence of a defendant's predisposition to engage incriminal activity, it may do so once a defendant submits evidence which raises the possibility that he was entrapped. Walther , 867 F.2d at 1343 (citing United States v. Salisbury, 662 F.2d 738, 741 (11th Cir. 1981), cert. denied, 457 U.S. 1107, 102 S.Ct. 2907, 73 L.Ed.2d 1316 (1982)). The introduction of ex- trinsic offense evidence is a reliable method of proving the criminal predisposition needed to rebut the allegation of

entrapment. United States v. Salisbury , 662 F.2d at 741.

The government offered Garcia's testimony not to demonstrate Childress and Roper's bad character, but to demonstrate predisposition. The first prong of Beechum is thereby satisfied. Also, a review of the record reveals that the prejudicial nature of the evidence does not out weigh its probative value, thereby satisfying the second prong of Beechum .

[11] The decision whether to grant a mistrial is within the sound discretion of the district court and will not be reversed absent a showing that the district court abused its discretion. United States v. Cousins , 842 F.2d 1245, 1247 (11th Cir.), cert. denied, — U.S. —, 109 S.Ct 139, 102 L.Ed.2d 111 (1988). We hold the district court's refusal to grant a mistrial in this case was not an abuse of discretion.

Severance

[12,13] Roper contends that the district court erroneously denied his motions for severance. Roper argues that he was gravely prejudiced by an abundance of evidence regarding alleged criminal activities involving unrelated transactions to purchase large quantities of marijuana from Garcia in the state of New Mexico. The government counters, arguing that the trial court instructed the jury to consider each appellant and each charge separately.

Defendants jointly indicted should be so tried. United States v. Marszalkowski , 669 F.2d 65, 660 (11th Cir.), cert. denied, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 167 (1982). An exception to this rule may be enforced where the joinder would cause would cause a defendant undue prejudice. United States v. Marszalkowski

at 660; Fed.R.Crim.P. 14. [2] In determining whether to grant or deny a motion for severance, "the trial judge is empowered to exercise sound discretion in balancing possible prejudice to defendant against governmental concern for judicial economy." United States v. Marszalkowski at 660. Inherent in every joint trial is some degree of prejudice and bias, but "only in the event such prejudice appears to be compelling does severance become warranted." United States v. Marszalkowski at 660 (citing United States v. Perez, 489 F.2d 51, 65 (5th Cir. 1973), cert denied 417 U.S. 945, 94 S.Ct.3067, 41 L.Ed.2d 664 (1974)).

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2. Fed.R.Crim.P. 14 provides, in pertinent part:]i[f it appears that a defendant is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires ...

The Eleventh Circuit Applies the following test for assessing the existence of "compelling prejudice:

> Whether under all the circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon the defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him? If so, though the task be difficult, severance should not be granted.

United States v. Marszalkowski at 660 (citing Tillman v. United States, 406 F.2d 930, 935 (5th Cir.1969)).

In light of the above standard and the record, the district court did not abuse its discretion in denying Roper's motion for severance.

Denial of Instruction on Lesser Included Offense

[14] The appellants contend that the district court erred by failing to instruct the

jury on the lesser included offense of conspiracy to possess marijuana. Th government argues that due to the quantity of marijuana involved, it was unnecessary for the district court to instruct the jury on the lesser included offense.

The appellants' contention is meritless. The evidence presented during the trial indicated that the appellants negotiated for a thousand pounds of marijuana. Because of the large quantity involved, it is inconceivable that the marijuana was intended for the appellants' personal consumption. It was therefore unnecessary for the district court to instruct the jury on the lesser included offense. United States v. Hirst, 668 F.2d 1180, 1184 (11th Cir.1982). Accordingly, we hold that the district court committed no error in refusing to instruct the jury on the offense of conspiracy to possess marijuana.

Supplemental Instruction

[15,16] During the deliberations, the jury posed a question: "If a defendant is not continuously involved, can he be convicted according to Count I?" The district court responded orally:

> One who willfully joins a conspiracy that is existing is charged with the same responsibility as if he had beeen one of the originators or instigators of the conspiracy. The extent of any defendant's participation, moreover, is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor part in the conspiracy. So if a defendant has an understanding of the unlawful nature of a plan and knowingly and willfully joins in the plan on one occasion that is sufficient to convict him for conspiracy, even though he had not participated before and even though he played only a minor part. However, if a person charged as a conspirator is just an observer or spectator, if he does not participate in the plan, if he doesn't agree to it, he's not a conspirator and he may not be convicted of conspiracy.

Appellants argue that the oral instruction prejudicially and unfairly responded to the jury's question. The government argues that the court did not have to give all of the conspiracy instructions again, and the instruction properly and clearly stated an answer to the jury's ques-

tion.

An appellate court must examine the entire jury charge and determine whether, taken as a whole, the issues and law presented to the jury were adequate. United States v. Abravaya , 616 F.2d 250 (5th Cir.1980). we find that the district court's oral instructions, adequately presented the issues and the law to the jury. Accordingly, the district court committed no error.

Effective Assistance of Counsel

[17] Belcher contends that the existing facilities at the Montgomery County Jail denied him assistance of counsel as guaranteed under the sixth amendment to the Constitution of the United States. Belcher asserts that he and his counsel were required to make public disclosures in loud voices by communication over a telephone and through a glass window and steel door. Belcher avers that other prisoners and law enforcement officers heard every detail of his

defense.

To prevail on this claim that his sixth amendment rights were violated due to the Montgomery City Jail's facilities for client/counsel interviews, Belcher must prove that: (1) tainted evidence existed in his case; (2) or, his defense strategy was communicated to the prosecution; or, (3) the government purposefully intruded on his case. See Weatherford v. Bursey, 429 U.S. 545, 558, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977). Belcher has failed to make any of these showings. Accordingly, we hold that Belcher's sixth amendment right to counsel was not violated. 3

Admission of Evidence

[18] Appellants Roper, Price and Belcher contend that certain evidence was improperly

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3. This holding is not intended to approve or disapprove of the jail's facilities. It is a holding based solely on the proof submitted in this case.

admitted on the basis of any inadequate predicate. This evidence consists primarily of tapes of telephone calls and videotapes of meetings.

Determinations of admissibility of evidence rest largely within the discretion of the district court and will not be disturbed on appeal absent a clear showing of an abuse of discretion. United States v. Russell, 703 F.2d 1243, 1249 (11th Cir.1983). The district court did not abuse its discretion in admitting the contested evidence.

Limited Cross-Examination

[19] Belcher contends that the district court erroneously and prejudicially limited his counsel's cross-examination of Agent Pigott, thereby violating his sixth amendment guarantee of the right to confront the witnesses against him.

The government argues that the cross-examination at issue concerned Agent Pigott's

possession and training in the use of firearms, and was irrelevant to the defense of duress. See United states v. Blanc, 754 F.2d 940 (11th Cir.1985) (to establish a defense of duress, defendant must show that he performed the unlawful act because (1) he was under an immediate threat of death or serious bodily injury, (2) he had a well-founded fear that the threat would be carried out, and (3) he had no reasonable opportunity to escape).

The government asserts that Belcher's counsel's questions as to whether Agent Pigott ever had to use a weapon in an arrest were irrelevant to the defense of duress. Further, the government notes that the district court properly instructed the jury on the defense of duress and coercion.

The district court did not abuse its discretion in limiting Belcher's counsel's cross-examination.

CONCLUSION

We affirm the convictions and judgments as to all the appellants.

AFFIRMED.